Supreme Court, U.S.
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No. 02-1293

In The
# Supreme Court of the United States

ANN COHEN; GLENN CRAIG;
JAMES EMBRY; SUSAN FISCHER,
in their individual capacities,

*Petitioners,*

v.

NATASHA THOMAS; SUSAN GIBBS;
EDWINA LEWIS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID A. FRIEDMAN
FERNANDEZ FRIEDMAN GROSSMAN
KOHN & SON PLLC
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001

*Counsel of Record*
*for Respondents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in applying settled law to specific facts when it held that police who conduct unlawful non-judicial evictions deprive tenants of protected property interests without due process of law?

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## STATEMENT OF THE CASE

Natasha Thomas (Thomas), Susan Gibbs (Gibbs) and Edwina Lewis (Lewis) lived at Augusta House in the fall of 1998. [Petition for Writ of Certiorari Appendix (Pet. App.) 4a-8a.][1] Augusta House is an undivided house located in Old Louisville, a residential neighborhood in Louisville, Kentucky. At the time, Mission House, Inc., owned Augusta House and Laurie Zinious (Zinious) managed it.

Each tenant had her own bedroom, but shared the rest of the house in common. They kept and cooked their own food, kept their own cosmetics and personal effects, did their own housekeeping and came and went as they pleased. They each had a key to the house; no one other than Augusta House residents lived there. Augusta House charged each tenant $140 per month to live there.

By late November, Zinious and the tenants were having disputes. The three tenants decided to seek legal advice from a Legal Aid Society (LAS) attorney. The attorney, Linda D. Roberts (Roberts), concluded from the above facts that her clients were Augusta House's tenants and could be evicted only in accordance with Kentucky landlord-tenant law. She advised them in detail of the steps Augusta House would have to take to evict them lawfully and explained the time frames involved in the process. Roberts also agreed to write to Zinious, explaining her opinion. After meeting with Roberts, the tenants went

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[1] The petitioners acknowledge that most relevant facts are undisputed [Petition for Writ of Certiorari (Pet.) at 3] and concede that, for qualified immunity purposes, all facts must be construed in respondents' favor. [*Id.* at 3 n.3.] Those facts are fully summarized at Pet. App. 4a-8a.

to the office of the Louisville Tenants Association (LTA), a tenant advocacy group. The LTA agreed to provide letters articulating a position similar to Roberts'.

The following Monday night, December 7, 1998, Augusta House's maintenance worker, Raymond O'Rafferty (O'Rafferty) appeared at the house with Louisville police. Officer Larry Cushman explained to the tenants that O'Rafferty had asked him to evict them. Cushman saw that Augusta House looked like a residence, he didn't witness any illegal activity and he determined that Augusta House had not served any eviction papers. Thomas also showed Officer Cushman her LTA letter. Officer Cushman told O'Rafferty that this was a civil dispute and that he would have to go through court to evict the tenants. O'Rafferty then called Zinious and told her what had taken place.

The next morning, Tuesday, December 8, 1998, the four respondent police officers appeared at Augusta House to evict the tenants. Three of the four knew that, if the tenants paid rent, their removal was a civil matter requiring Augusta House to evict them through court. They nevertheless failed to ask the tenants whether they paid rent. Instead, they simply told the tenants that they would have to get out. And they made that decision after Zinious informed them that this was "standard procedure."

The tenants (having already sought legal counsel and fended off police once) insisted that they paid rent, had keys and had the right to remain there. Thomas even showed one police officer her LTA letter, but to no avail. At Lewis' urging, Gibbs called Roberts and told her that the police were evicting them without judicial process. While Gibbs was speaking with Roberts, petitioner James Embry

told her to get off the phone and leave Augusta House immediately. The tenants explained that Gibbs was speaking with their lawyer. Embry laughed and said that the tenants were homeless and didn't have a lawyer.

The women then left Augusta House under police order. They immediately went to Roberts' office at LAS. Roberts filed suit on the tenants' behalf against Mission House, Inc., and, through settlement, secured alternative housing for them several days later.

The three tenants filed suit against the petitioner police officers. The district court denied the petitioners' summary judgment motion on qualified immunity grounds; in so doing, the district court held that – construing disputed facts favorably to the tenants – the officers' non-judicial eviction violated clearly established Fourth Amendment seizure and Fourteenth Amendment due process law. [Pet. App. 57a-58a.]

On appeal, a divided panel affirmed the district court's due process decision, but a differently-divided panel reversed the district court's seizure decision. [Pet. App. 3a-48a.] The Sixth Circuit denied panel and *en banc* rehearing. [Pet. App. 1a-2s.]

## REASONS FOR DENYING THE WRIT

Review is inappropriate for two reasons. First, the Sixth Circuit correctly applied settled law in finding that the petitioners' conduct violated clearly established due process law. The petitioners merely seek to correct what they perceive as an incorrect application of well-settled legal principles.

Second, there is no real conflict among the circuits. While the courts of appeals have had to wrestle with application of two cases to specific facts, that is the natural result of this Court's decisions. The cases are harmonious and the courts of appeals have faithfully applied them. *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Zinermon v. Burch*, 494 U.S. 113 (1990), establish the substantive law governing when officials commit "random and unauthorized" acts, so as to preclude predeprivation process. And *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002), establishes that prior cases need not involve "fundamentally similar" facts to constitute "fair warning" that certain conduct was unconstitutional, thus depriving officials of qualified immunity. Difficulty in applying these clear principles to specific sets of fact does not imply any uncertainty in the principles or any conflict in their application.

## ARGUMENT

### I. Respondents Seek Plenary Review Merely To Challenge The Sixth Circuit's Application Of Established Law To Particular Facts.

This Court's procedural due process and qualified immunity law provides clear guidance and the Sixth Circuit merely applied those cases to particular facts here. The Fourteenth Amendment prohibits states from depriving a person of property without "due process of law." U.S. Const., amend. XIV, § 1. But "[p]roperty interests are not created by the Constitution." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source

such as state law. . . . " *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Kentucky law protects tenants' leasehold interests. *See* Ky. Rev. Stat. §§ 383.200 *et seq.*; Ky. Rev. Stat. §§ 383.500 *et seq*. This is not surprising, for leasehold interests, like other interests in real property, are "of historic and continuing importance." *United States v. Good Real Property*, 510 U.S. 43, 53-54 (1993) (holding that *ex parte* forfeiture hearing violates due process); *see also Connecticut v. Doehr*, 501 U.S. 1 (1991) (holding that state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional).

At issue in this case, then, was whether the police afforded the tenants the process that was due before depriving them of their leasehold property interests. The "root requirement" of due process is "that an individual be given an opportunity for a hearing before [she] is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). This Court's decisions "establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *Good Real Property*, 510 U.S. at 48. And that rule applies to welfare benefits, goods and chattels, kitchen appliances, household furniture, and wages. *See Matthews v. Eldridge*, 424 U.S. 319 (1976) (social security disability benefits); *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) ("absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified"); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("whatever its form, opportunity for . . . hearing must be provided before the deprivation at issue takes effect"); *Sniadach v. Family Finance*

*Corp.*, 395 U.S. 337, 342 (1969) (Justice Harlan, concurring) ("absent notice and a prior hearing ... this prejudgment garnishment procedure violates the fundamental principles of due process") (citation omitted); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Nor is this core principle merely symbolic or academic. On the contrary, its purpose "is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect [her] use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property. . . . " *Fuentes,* 407 U.S. at 80-81.[2]

Consistent with these principles, this Court held in *Good Real Property* that seizure of real property subject to civil forfeiture under federal drug laws violated due process when preceded only by an *ex parte* hearing before a Magistrate Judge. *Id.*, 510 U.S. at 54-56. The Court concluded that *ex parte* seizure creates an "unacceptable risk of error," *id.* at 55, and affords "little or no protection to the innocent owner." *Ibid.* Nor might "the availability of a postseizure hearing ... [provide] recompense for losses caused by erroneous seizure." *Id.* at 56.

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[2] Exceptions to the requirement of predeprivation notice and hearing are allowed only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie*, 401 U.S. at 379; *accord*, *Fuentes*, 407 U.S. at 82; *Good Real Property*, 510 U.S. at 501. Here, there is no hint that extra-judicial police evictions serve any valid governmental interest, much less an extraordinary one.

*Good Real Property* compels the same results here, as the Sixth Circuit held. [Pet. 28a-30a.] These extra-judicial police evictions created an unacceptable risk of error, afforded little or no protection to the tenants, and did not allow for adequate recompense in a postseizure hearing. And this case involved less process or governmental purpose than *Good Real Property*. There, the government sought to fight illegal drugs. Here, the tenants committed no crime; rather, the police merely enforced Zinious' civil property interests. There, a Magistrate Judge held a preseizure (albeit *ex parte*) hearing. Here, the police circumvented the adversarial judicial hearing required by Kentucky law.

The respondents nevertheless argue that the police eviction here did not violate due process because the evictions were "random and unauthorized" under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), thus obviating the need for, and efficacy of, predeprivation process. [Pet. 7-13.] And they argue that the Sixth Circuit wrongly deemed *Zinermon v. Burch*, 494 U.S. 113 (1990), to limit *Parratt* and to control here.

But *Parratt* and *Zinermon* are harmonious and the Sixth Circuit merely applied their principles to these facts. In *Parratt*, this Court held that property deprivations resulting from "random and unauthorized" governmental actions did not violate procedural due process so long as the government provided adequate post-deprivation remedies. *Id.*, 451 U.S. at 541-44. And in *Zinermon*, 494 U.S. at 128, this Court stated that *Parratt* is a "special

case . . . in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide."[3] Here, the state was in a position to provide for predeprivation process and did so by statute. The landlord-tenant laws allow for prompt, summary adjudication of possession disputes. That, not the extrajudicial conduct of the police here, is what due process requires, as the Sixth Circuit correctly held.

## II. There Is No Significant Conflict In The Federal Appeals Courts.

The petitioners correctly note that the decision below conflicts with *Reese v. Kennedy*, 865 F.2d 186 (8th Cir. 1989). [Pet. 8.] But *Reese* predated *Zinermon* and its broad reading of *Parratt* is foreclosed by *Zinermon*'s narrower reading, as the Sixth Circuit correctly held. [Pet. App. 34a-35a.]

Nor do the other circuit court cases petitioners cite reflect "confusion" in applying *Parratt* and *Zinermon*.

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[3] Recognizing this, the Sixth Circuit has held *Parratt* inapplicable to an eviction case, even in an emergency, because "post-deprivation state tort remedies are neither timely nor sufficiently remedial. . . . Fundamental fairness expects more of a state than mere tort remedies where government dispossesses its citizens from their homes." *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994). *See also Mackey v. Dyke*, 29 F.3d 1086, 1093 (6th Cir. 1994), *aff'd after remand on different grounds*, 111 F.3d 460 (6th Cir.), *cert. denied*, 522 U.S. 848 (1997) (*Parratt* inapplicable where government "was in a position to provide for predeprivation process"); *Harris v. Akron*, 20 F.3d 1396, 1402 (6th Cir.), *cert. denied*, 513 U.S. 1001 (1994) (*Parratt* inapplicable where state provides predeprivation procedure for depriving person of rights).

Rather, they make the unremarkable point that line-drawing – including traversing the boundary between *Parratt* and *Zinermon* – can be difficult; but it is a difficulty fully familiar to courts. Thus, for example, *O'Neill v. Baker*, 210 F.3d 41 (1st Cir. 2000), "viewed *Zinermon* as a case in which state law did authorize the procedure followed (albeit unconstitutionally), so that the act of the officials could not be described as random and unauthorized." *Id.*, 210 F.3d at 50 (internal quotation marks omitted). Here too, Kentucky law permits law enforcement officials to evict tenants, but only when executing a judicial writ of possession – that is, only after affording predeprivation process. *Caine v. Hardy*, 943 F.3d 1406 (5th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992), deemed *Zinermon* to "not explicitly or implicitly disavow . . . *Parratt* . . . " but instead to "require[] case-by-case analysis of the deprivation at issue." *Id.*, 943 F.3d at 1415. And application of *Zinermon* and *Parratt* requires courts to "determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards." *Id.* Here again, the Sixth Circuit concluded that Kentucky could and did foresee the wrongful eviction of tenants by providing procedural safeguards.

The courts of appeals thus understand how *Parratt* and *Zinermon* mesh together. The petitioners merely quarrel with the Sixth Circuit's application of those familiar principles to these facts. Their quarrel does not warrant this Court's review.

Nor does *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002), undercut the Sixth Circuit's qualified immunity decision. The court of appeals deemed several of its and

this Court's cases to give the "fair warning" of unconstitutionality that *Hope* requires. Most notably, *Flatford* applied *Zinermon* to hold that even emergency evictions required resort to a state's prescribed predeprivation process, because "post-deprivation state tort remedies are neither timely nor sufficiently remedial. . . . Fundamental fairness expects more of a state than mere tort remedies where government dispossesses its citizens from their homes." *Id.*, 17 F.3d at 169. Nothing about the Sixth Circuit's decision conflicts with this Court's qualified immunity cases, is inconsistent with *Hope* or creates any circuit conflict.

## CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the fact-specific inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

DAVID A. FRIEDMAN
FERNANDEZ FRIEDMAN GROSSMAN
KOHN & SON PLLC
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001

*Counsel of Record for Respondents*